Social rights and the rule of law

SOCIAL RIGHTS AND THE RULE OF LAW

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1. Introduction

According to the Preamble to the Revised European Social Charter all human rights are indivisible, civil, political, economic, social and cultural. Both civil and political rights as well as economic, social and cultural rights come from the same heritage, common to the European states. In comparison to the Preamble to the European Convention of Human Rights, what is missing from the Preamble to the Charter is an important element specifying this common European heritage, namely no reference is made to the rule of law.

However, it seems to me to be self-evident that the Charter, because of the element of indivisibility, also presupposes fundamental rights and freedoms and the rule of law from which they stem. But also the opposite is true: fundamental freedoms are closely linked to social prosperity and progress.

It is useful, in order to give these abstract notions a more specific content, to refer to a much more concrete concept: concepts as the rule of law, the 'Rechtsstaat', constitutionalism and democracy all seem to have as a common element the obligation to treat all individuals as equals and to treat them with equal respect. Individuals have to be taken seriously and their lives have to be afforded the same value; these guarantees lead to the acceptance of freedom rights, but also to the duty incumbent upon the state to act accordingly. Just as an arbitrary detention violates this principle of equal respect, so do arbitrary deprivations of food, housing, work, environmental protection, and social security.

One of the main arguments forwarded again and again against economic, social and cultural rights as being rights in a true sense, is that economic, social and cultural rights are nothing more but abstract and collective notions. As abstract and generalized as the principle of equal respect. And it has to be said: reading international documents one is sometimes struck by the fact that social rights have been formulated in such abstract, vague, general and collective sets of principles, seemingly lacking any enforceable concreteness and missing a specific relation to everyday's life and a governments activities.

However, I am of the opinion that this approach does not reflect legal nor factual developments or

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realities.[1]

First it has to be noted that the notion of equal respect as a central element in postulating social rights can lead us away from the abstractness and generalizations. It points to the need to being concrete and trying to formulate social rights as individual justiciable rights.

Equal respect means protection against unfair dismissal, protection against environmental nuisance infringing one's private life or even health, the right to go to court in the context of social security in order to have one's claims ruled upon by an impartial and independent tribunal, the right not to be in hazard because of sub-standard conditions of work, etc. etc. Social rights have as their aim individual protection; in that respect they do not differ from civil and political rights. What may be has been lacking is a true effort to try to detect these individual justiciable elements, to have them enforced in supervisory machineries, and to have them formulated in such a way that politicians, lawyers and judges can grasp their real concrete meaning. In that respect the Charter has been unjustly underesti-mated.

In various national legal orders, however, national constitutional provisions pertinent to social rights had an important impact, such as for instance the "Sozialstaats"clause in article 20, section 1 of the German Constitution; and the various provisions in the Preamble of the 1946 French Constitution. According to established doctrine and case-law these preambles are part of the present constitutional framework under the 1958 Constitution.

The Preamble to the Single European Act of 1986 makes explicit reference to the Social Ccharter; and the European Court of Justice has already accepted the relevance of the Charter's provisions.[2]

In European states an immense quantity of legislation exists in order to protect employees, women, migrant workers, children, the environment etc.; in order to set up systems of health care, education, vocational training etc.; and in order to guarantee the rights and freedoms of trade unions and their rights to bargain and to strike. Under national legislation individuals have been afforded various rights vis-á-vis their employers, government agencies, and others. From a very general point of view these aspects and developments show how well integrated social rights have been in national legal orders. So

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[1] See also Pierre-Henri Imbert, Droit des Pauvres, Pauvre(s) Droit(s)? Réflexions sur les droits économiques, sociaux et culturels, Édition Spéciale de La revue de la Commission Internationale de Juristes, Décembre 1995, No. 55, p. 97-110; Martin Scheinin, Economic and Social Rights as Legal Rights, in: Econmic, Social and Cultural rights, A textbook, Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), Dordrecht, Boston, London 1995, p. 41-62; and G.J.H. van Hoof, The Legal Nature of Economic, Social and Cultural rights: A Rebuttal of Some Traditional Views, in: P. Alston and K. Tomasevski (eds.), The Right to Food, 1994, p. 97-110.

[2] ECJ, 24/96, ECR 1988, 379, 2 February 1988, Vincent Blaizot.

well integrated that the point about their justiciablity seems to be self evident.

I intend to show you from different points of view the indivisibility of all human rights, civil and social; the first point of view will be the European Convention of Human Rights. The reason to start with a brief exposé on the social dimensions of the Convention is that the case-law of the Court is the best illustration of the two points I have been making. 1. the feasibility to define individual and justiciable social rights; and 2. the indivisibility of the two sets of rights: civil and social rights. I will do so briefly, in order to being able to transplant the findings to the Social Charter.

Subsequently we will shift the perspective and analyse the Charter itself, but taking advantage of the approach resorted to by the Court. In that respect I will show that the Charter, as is the case with respect to the Convention, is based upon general principles, but at the same time that it is very well possible to deduce justiciable norms and more concrete obligations from these principles. And to go even further, this approach is what lawmaking is about.

Thirdly I will discuss some arguments in the context of social rights, being that these rights cannot claim universal recognisance because they supposedly impose a specific type of economic order, which would make social rights not real rights, i.e. not rights anyway that are neutral and leave politics in general and budgetary politics and economics in particular to the elected politicians. I will show that this view is also unfounded in the perspective of the Charter, which is not, nor does it claim to be, a treaty on economic policies leaving no room for manouvering to politicians. Instead the Charter is concerned with fundamental and elementary rules on equal treatment, equal respect and due attention for human dignity, limiting national politics but certainly not fully defining these national policies. It poses a progressive minimum.

2. European Convention

The European Convention and the Social Charter have many principles in common; they aim in various respects at protecting similar rights. For instance both treaties prohibit "forced labour" in the articles 4 ECHR and 1 (2) ESC. Art. 8 ECHR and art. 17 ESC as well as art. 19 (6) ESC concerning family reunion protect different aspects of the right to family life; and art. 11 ECHR and art. 5 ESC both contain guarantees as to trade union freedom.

Apart from these apparent similarities there exist many more parallels between the Convention and the Charter. In order to detect these we have to analyse somewhat the case law of the European Court of Human Rights, which shows a willingness on the part of the Court to accept and develop all kinds of social rights.

In a long line of established precedents the Court has accepted the existence of social-elements in the Convention and it has developed various examples of positive obligations, derived from the civil and political rights and being an essential part of these rights. Examples are:

the *Golder* case, establishing the right of access to court[3];

the *Airey* case, finding that occasionally there might be a need to have a scheme of free or at least subsidised legal aid[4];

the positive obligations incumbent on the State in the context of article 8, concerning the need to protect and guarantee family life and family relations;

the *Powell and Rayner* case, accepting the applicability of article 8 in environmental issues[5], and the *López-Ostra* case, in which the Court found a violation of article 8, because of a state having neglected its positive obligations to protect someone's health and private life against environmental intrusions[6];

the *Sigurdur A. Sigurjónsson* case[7] and the *Gustafsson* case[8]; the former obliging the state to outlaw closed-shop practices and the latter reiterating the positive obligation to protect freedom of association rights of an individual.

These examples offer only a few instances of the wide-range of cases in which the Court was willing to accept the useful effect of individual rights and to derive therefrom enforceable, individualised positive duties.

The important lesson to be learnt is that state performance can be enforced whenever the following criteria have been met:

1. (in the context of the Convention) there must be the connection with a specific right, which must be rendered useless or without any real effect without accepting a corresponding positive obligation.

2. The formulation of a specific positive obligation alway takes place in the context of an adversary proceeding and is therefore always phrased in justiciable and concrete terms; maybe it relates to a more abstract general principle that lurks in the background, the positive obligation itself is precise and can

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[3] ECHR 21 February 1975, Series A, vol. 18.

[4] ECHR 9 October 1979, Series A, vol. 32.

[5] ECHR 21 February 1990, series A, vol. 170.

[6] ECHR 9 December 1994, Series A, vol. 303-C; about this case Aalt Willem Heringa, Private Life and the Protection of the Environment, Maastricht Journal of European and Comparative Law (MJ) 1995, volume 2, number 2, p. 196-204.

[7] ECHR 30 June 1993, Series A, vol. 264.

[8] ECHR 25 April 1996.

be applied and handled by the national courts. And the content of a positive obligation can and has to be determined in individual, adversary proceedings.

3. The Court sometimes, in the context of formulating newly developed positive obligations, explicitly refers to common ground in the Member-States; national laws, national case-law, national legal opinions can be of assistance in formulating a minimum layer of positive duties incumbent upon the Member states.[9]

4. Fourthly, the Court has always accepted the presence of a margin of appreciation in assessing whether a positive obligation incumbent on a Member State has been met. Positive obligations are no absolute duties, (the same applies for the freedom rights, since, generally spoken, they can be restricted as well); whether they have been met is a question of wise judgment and requires a careful process of balancing all the conflicting interests involved, on the side of the individual applicant as well as concerning the State.

5. This balancing approach implies implicitly the necessity for States to carefully address social rights issues and the scope and impact of their positive obligations. The Court's approach therefore implicitly urges the States to motivate solutions pertinent to social rights issues; and it also underlines the Court's respect for the national law-making and budgetary process, as long as reasoned consideration has been given to social rights interests and these interests have not been arbitrarily affected, thereby giving rise to the claim that the State has shown no due respect to an individual's needs or freedom rights.

It can be concluded from this brief exposé that it is feasible to combine freedom rights and social rights to a common set of principles, giving rise to state obligations to abstain and to obligations to actively interfere and take measures to protect the legal position of an individual as well as his or her position as a member of society. A member who is capable to invoke the right to be let alone as well as the right to be assisted whenever the basic elements of human dignity and integrity are at stake.

If it is possible for a court to ultimately assess the value of someone's property (article 1, First Protocol), then it cannot be negated that the same court can also establish the value of someone's work in relation to the minimum standards of subsistence. If one accepts that article 8 of the Convention can offer protection against serious environmental health hazards, it is impossible not to accept as a logical corollary human rights protection for issues such as minimum wage or welfare, without which an individual's life and development are also in serious jeopardy.

Now it is time therefore to move on to the Charter and to investigate and analyse its achievements in the area of concrete, individualised positive obligations. It is in that context that, if we accept the examples

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[9] On this interpretation technique: Aalt Willem Heringa, The 'Consensus Principle'. The role of 'common law' in the ECHR case law, Maastricht Journal of European and Comparative Law (MJ) 1996, volume 3, Number 2, p. 108-145.

set by the Convention, and I submit that these are cogent examples, important achievements have been made which show that social rights can be made justiciable, enforceable and concrete.

3. European Social Charter

- General

A central element in treaties such as the (Revised) European Social Charter is that they tend to describe the rights and obligations contained therein as abstract general obligations or as general principles. That feature tends to lead to doubts and questions as to the justiciable content. However, the Charter has tried to distinguish from the beginning between the general principles upon which the treaty provisions have been founded on the one hand, and the more concrete treaty obligations on the other. The former general principles are stated in Part I, whereas the precise obligations are specified in Part II[10]. This is certainly an important difference with the International Covenant on Economic, Social and Cultural Rights (ICESCR)[11], which makes it easier to accept the Charter as being more specific and concrete, as well as allowing for the discovery and derivation from the general principles of further, more concrete sets of standards and subnorms. How this can be achieved has been shown by the Strasbourg Court in the context of the Convention, and by the Committee of Experts operating under the Social Charter. Hereafter I will show some instances of this technique and its impact.

- Positive and negative principles

The list of principles in Part I of the Charter can also make the reader aware of the fact that, since they are principles, it is important to detect what it is they protect. An interesting feature of these principles is that they can be formulated in the positive, as has been done in the Charter; but also (in many

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[10] And the Charter has many precise standards in the various provisions, which as such support the point about the Charter's specificity and enforceability. However, my argument goes further and is that even many more general provisions or the principles behind the Charter's provisions contain specific and enorceable rights.

[11] However, see for an interesting attempt to try to concretise the ICESCR, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, published in Human Rights Quarterly, volume 9, number 2, May 1987, p.122-135. In January 1997 a sequence to the Limburg Principles has been drafted: The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (to be published in the Human Rights Quarterly). These guidelines start from the same assumptions as those inherent in this article: to accept the feasibility of determining violations of economic, social and cultural rights and to elaborate on their scope and content and the appropriate available remedies.
See also the Déclaration et Plan d'action de Bangalore de la Commission international de juristes, in: La Revue, note 1, p. 241-250.

instances) as negative principles. A few examples can illustrate this approach and they can also clarify my starting point that it is feasible to formulate and interprete social rights as also encompassing enforceable claims.

The second principle reads: "All workers have the right to just conditions to work", and principle 3 adds: "All workers have the right to safe and healthy working conditions." These principles can and should be interpreted to mean that (as an enforceable minimum) bad conditions of work, that infringe human dignity, make work unsafe, unhealthy, are abusive and unreasonably related to general standards of work in europan societies, should be considered a violation and ought to be prohibited by the national legislatures. In that respect their content is not fundamentally different from the *López-Ostra* case decided by the Strasbourg Court[12].

The 26th principle reads: "All workers have the right to dignity at work." This principle certainly aims at outlawing practices of abuse, harassment, degrading treatment and the like. Put in that sense it is manifest that it can and should be a justiciable provision. The Member States are under the positive obligation to prevent and remedy abuse and abusive practices, which is different from saying that a court should be in a position to proscribe the conditions at work. Below a specified minimum the courts should certainly be able to intervene, the national legislatures have the primary responsibility to further improvement of social conditions. And they are also under an obligation of being able to show progress and/or an effort. The progress made and the efforts put into gradual improvement of working conditions can certainly be referred to in assessing whether the conflicting interests have been rightly and justly balanced. But it has also to be admitted in this regard that the intervention by a court is less likely; this does not mean, however, that this means that a supervisory organ is powerless. It can urge for improvement; it can ask for motivated reasoning; and it can, after a lapse of time, after a greater number of Member-States have made progress and have acquired a higher level of protection, impose this new level of protection upon those states who are lagging behind. This may sound drastic, unprincipled, and lawmaking by the judiciary, but it is the approach by the Strasbourg Court with regard to the European Convention. And one to which we are used.[13]

- Differentiation in levels of protection/implementation

This Court occasionally accepts that in some states a higher level of protection is offered to some

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[12] ECHR 9 December 1994, Series A, vol. 303-C.

[13] Similar examples could be found in national case law; Virginia A. Leary, Justiciabilité du droit à la santé et au-delà du concept: les procédures de plaintes, La Revue (note 1), p. 119-138, p. 127 illustrates this aspect by referring to U.S. case-law.

specific groups than in other states. The best example in this respect concerns the cases *Rees*[14], *Cossey*[15] (both against the United Kingdom) and *B v. France*[16], dealing with the legal position of transsexuals. The relatively bad situation in the United Kingdom for transsexuals did not give rise to a violation of the Convention, but it certainly could do so in the future, after developments have taken place in the national legal orders, supporting the argument that a new common ground has emerged leading to a higher level of protection. The notion of progress, inherent in the area of social rights, therefore cannot uniquely be described as a social rights feature, thereby making social rights less capable of enforcement. The example shows that (social) progress is also a feature present pertinent to freedom rights and the determination of the scope of their protection, in which areas the Court seems fully capable of handling the issue.[17]

- Enforcement/implementation through other rights and principles

Another analogy that could be drawn with the Convention is that, whereas the Court injects the Convention provisions with social rights elements and positive obligations, the Charter could profit from a reliance on other enforceable rights, such as the right to privacy and the equality principle. The importance of the former right in the context of social right is shown by the Strasbourg Court in the afore-mentioned *López-Ostra* case; the relevance of the equality principle was clarified in the *Gaygusuz v. Austria*[18] decision.

- .....through equality

Article 14 jo. article 1 of the First Protocol (right to property) were successfully invoked in challenging the refusal to grant a non-Austrian citizen a welfare benefit. The case-law of the Human Rights Committee showed how important the equality clause of article 26 of the International Covenant on Civil and Political Rights (ICCPR) is even in the area of social rights in general, and of socal security

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[14] ECHR 17 October 1986, Series A, vol. 106.

[15] ECHR 27 September 1990, Series A, vol. 184.

[16] ECHR 25 March 1992, Series A, vol. 232-C.

[17] The fact that one can agree or disagree with the outcome of the Court's decisions in the aforementioned cases cannot be used as an argument that the Court is not capable; all that it supports is that one has different ideas on interpretation, lawmaking or the role of the judiciary. It merely supports an argument that a Court ought not to enter a "political thicket"; it does not say that the Court cannot satisfactorily do so.

[18] ECHR 16 September 1996.

in particular.[19] As the Committee reasoned in these cases: "Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant."

The non-discrimination clause in the Revised European Social Charter (Part V, Article E) can therefore be considered a very important new instrument in the implementation and enforcement of social rights. Although it could already be argued, and the Committee of Experts occasionally did so, that all material treaty provisions presuppose the equality principle by stipulating rights for all workers for instance, the innovation brought by article E is an important one by removing any doubt about the relevance of non-discrimination. In this respect regard should also be had to Article 20, stipulating the right to equal opportunities and equal reatment in matters of employment and occupation without discrimination on the grounds of sex.

- .....through the right to privacy

The privacy approach (including the protection of private life ánd family life) could further be helpful in such diverse areas as Article 11, The right to protection of health; Article 13, The right to social and medical assistance; Article 16, The right of the family to legal protection; Article 17, The right of children to legal protection. In particular one could deduce a right to be duly informed and consulted whenever an interference with an individual's health occurs.

- Justiciable Charter provisions

Let us take a further look at the Charter and its possible justiciable impact on the domestic legal orders of the Member States.

First of all it is important to, again, underline the relevance of and the similarity with freedom rights. Article 5, The right to organise; Article 6, The right to bargain collectively, provide two more examples. But also, considered in the light of (the principle of) Article 10 of the Convention[20], the right to information and consultation (Article 21); the right to take part in the determination and improvement of the working conditions and working environment; the right to information and consultation in

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[19] See among others: *Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984; *Broeks v. the Netherlands*, Communication No. 172/1984, and *Danning v. the Netherlands*, Communication No. 180/1984).

[20] The Commission already accepted the applicability of Article 10 of the Convention in a case concerning the secrecy of information pertinent to a polluting factory. The absence of information can in this approach be qualified under the freedom to receive information as well as an absence of sufficient, procedural guarantees under article 8. (Application No. 14967/89, Anna Maria Guerra and 39 others v. Italy, 29 June 1996).

collective redundancy procedures (Article 29).

- Procedural rights

These rights also point to the importance of having procedural rights available as an instrument in improving upon the quality of social living and working conditions. Article 6 of the Convention (access to court), as well as procedural guarantees developed by the Court in the context of other articles (for instance: article 8!) have also proven their value in enforcing the other material rights laid down in the European Convention of Human Rights. And the same holds true, and will hold true, for the Charter. We only have to be reminded of the case-law of the European Court concerning the applicability of article 6 with regard to disputes concerning social security benefits.[21] Under the Charter the same approach has been taken: for instance under art. 13 (1) a right to be accorded assistance, to be invoked before a court, has been recognised.[22] [23]

This argument focussing upon the importance of procedural rights and guarantees also implies in the area of social rights, the recognition of the special position of non-governmental organisations. That is expressis verbis the case with respect to the right to organise and the right to bargain collectively; articles 5 and 6 both mention employer's and workers' organisations and allot these organisations a role in consultations and negotiations. However, it should be considered to be an essential, procedural part of other rights as well, for instance the right to housing in article 31, that non-governmental organisations will be recognised as partners to be consulted and as organisations with full capacity to institute national legal proceedings for the protection of the more general aspects of social rights and in those instances in which no aggrieved individual with a sufficient interest to take court action can be found.[24] In general, it is in my opinion not only an essential component of many social rights to recognise the standing of non-governmental organisations, it could also be argued to be an inevitable consequence on

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[21] See inter alia: ECHR 24 June 1993, *Schuler-Zgraggen v. Switzerland*, Series A, vol. 263.

[22] See infra sub "The impact of the interpretation in the Conclusions".

[23] Another example in this respect is art. 19 (8) (offering protection against expulsion): the Committee of Independent Experts has stated on various occasions that"the right of appeal to a court or another independent body must be safeguarded even in cases where such deportation order is made on the grounds of "national security , public interest, or morality"." (Conclusions VII, 109-110).

[24] Other examples are art. 30 sub b (Revised) SC: the undertaking to review measures to reduce poverty and social exclusion; the explanatory report states that "(t)his review may, in order for the measures mentioned in the provision to be efective, include consultations with the social partners and various other organisations, including organisations representing persons who find themselves in a situation of poverty or social exclusion." Anoyther example is art. 14 (2): "..to encourage the participation of individuals and voluntary or other organisations in the estabishment and maintenance of [welfare] services."

the national level of the introduction of the collective complaints procedure.

Another example within the context of the Charter could be found in the rights aimed at guaranteeing safe working conditions. The pertinent clauses (articles 2, 3, 26) could be utilised in order to effectuate a reversal of the burden of proof whenever an employee falls ill and can show that his illness could have been caused by unsafe working conditions or by the materials he had to work with: wouldn't it then be up to the employer to disprove these allegations and to show that there is no relationship whatsoever between the disability and the working conditions, or that he has taken all necessary precautions to prevent contamination or other health hazards.

- The role of national courts

Awareness among the national legislatures and the national courts of the importance of procedural guarantees in order to effectively promote and further all fundamental human rights, including social rights, therefore should be furthered.[25] Once a Dutch Labour Court prohibited an employer from discriminating between non-national and national employees. It argued that such a distinction was not in conformity with the general principle, laid down in the Dutch Civil Code[26], that an employer should behave as a good employer[27].

A second example relates to the case before the Dutch Supreme Court dealing with a reduction in the maximum amount of years during which students were allowed to study and be eligible for financial support from the State. Since this reduction disadvantaged not only future students but also those who were actually studying, the Court judged this reduction to violate justified expectations of the students involved and therefore to infringe the principle of legal certainty. This principle was considered to have its impact also in the social rights field. It is interesting to again note that the method of implementation via other rights makes it legally possible, to a certan extent, to inhibit the withdrawal of social right

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[25] The Déclaration et Plan d'action de Bangalore de la Commission internationale de juristes (note) states in that respect (18.5.4); "Les juges devraient appliquer au plan national les normes internationales relatives aux droits de l'homme dans le domane des droits économiques, sociaux et culturels. Lorsqu'une constitution ou une législation nationale présente des ambiguïtés, ou qu'il existe une lacune apparente dans la loi, ou que celleci est incompatible avec les normes internationales, les juges devraent lever l'ambiguïté ou rétablir la conformité ou bien pallier la lacune en s'inspirant de la jurisprudence développée par les organes internationaux s'occupant de droits de l'homme. (...)"
The Maastricht Guidelines (note 11) stipulate in this respect (no. 24): "National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisons of international and regional human rights law as an interpretative aide in formulating any decisions relating to violations of economic, social and cultural rights."

[26] Article 6A:1638z.

[27] Kantongerecht Gorinchem 8-12-1986, NJ 1988, 68.

laws, and of social rights. In this respect the principle of legal certainty could be resorted to in order to enforce the concept of progressive realisation also inherent in the Social Charter.

And to give even more examples related to the Charter: article 24, the right to protection in cases of termination of employment as well as the new Collective Complaints procedure are indispensable in furthering the cause of social rights. They once again show the pertinence of procedural aspects.

- Compensation

Under article 50 of the Convention the Court can award compensation; furthermore article 5 (5) also contains a provision on compensation for an illegal detention; and the Court has developed under Article 1, First Protocol, the requirement of adequate compensation for deprivations of property. In the context of social rights it could also be argued that the possibility for national courts to award damages when states have not complied with their treaty obligations could be an interesting and useful instrument. It is an important remedy for the individual concerned, and at the same time does not require the court to pronounce on all the aspects of how a specific Charter provision has to be implemented. That can and should primarily be left to the competent state organs; but a relief in the form of compensation, and occasionally a simple declaration, is a method to offer an effective and adequate remedy on the individual level of a concrete case. The absence of the availability of such relief could therefore be held to constitute a violation of a relevant specific Charter provision.

- The impact of the interpretation in the Conclusions

Many justiciable subnorms have been developed by the Committee of Independent Experts in its Conclusions[28]. Herafter I will illustrate the points I have been making by giving a few examples from the Conclusions. In my opinion they underline that the Charter has become increasingly relevant in containing enforceable social rights standards:

- The non-discrimination principle as an inherent part in for instance article 1(2) (Right to work); in article 4 (equal pay); and in article 12(4) with regard to social security. In the context of article 1 (2) for instance the Committee has stated that "the duty of a female civil servant to resign on marriage and

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[28] An analysis and description of the Charter and the Conclusions of the Charter have been given by David Harris, The European Social Charter, Charlottesville 1994; and David Harris, The European Social Charter, in: Law and Practice of the European Convention on Human Rights and the European Social Charter, D. Gomien, D. Harris, L. Zwaak, 1996, Council of Europe Publishing; also very illuminative are the Social Charter monographs; until present, five have been published: No. 1, The family, organisation and protection within the European Social Charter (1995); No. 2, Women in the working world, equality and protection within the European Social Chater (1995); No. 3, Children and adolescents, protection within the European Social Charter (1996); No. 4, Migrant workers and their families, protection within the European Social Charter (1996); No. 5, The right to organise and to bargain collectively, protection within the European Social Charter (1996).

the fact that married women cannot enter the civil service" is discriminatory[29]. Article 1 (2) implies that certain requirements as to the entrance of employment are not admissible "such as those based on race, colour, sex, political opinion, religion, etc.."[30] The Committee even went further by also stipulating that the equality principle in the context of employment requires an extra set of guarantees, enforceable in court proceedings; for instance that discriminatory clauses in employment contracts and in collective agreements are null and void[31], or that safeguards exist against retaliatory measures[32]. In general the Committee also shows an interest under the equality principle in penalties under national law, the available compensation (supra) and the burden of proof.[33]

- A definition of fair remuneration (article 4); in that respect the Committee uses as an indicator that it considers 68% of the average national wage being the poverty-line: " .. the average national wage (is taken) as an indicator of the average standard of living of a population."[34]

- The recognition that individuals need to be given a subjective right under national law, invokeable and inforceable in court proceedings, with regard to article 13, the right to social assistance. The States have the obligation to grant necessitous persons social assistance as of right. With this individual right corresponds an obligation upon the States "which they may be called on in court to honour".[35] The existence of a subjective right to a benefit also requires the availability of an effective remedy.[36]

- As the Committee did in the context of article 4 (fair remuneration), it also defined the minimum necessary level of a social benefit. It stipulated that a benefit of less than 50% of the national per capita income was rather low.[37]

- Under article 17 (the right of mothers and children to social and economic protection) the Committee recognised, in line with case-law of the European Court with regard to article 8 of the Convention,

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[29] Conclusions I, p. 166

[30] Conclusions VIII, p. 29-30

[31] Among others Conclusions X-1, p. 38

[32] Conclusions XIII-1, p. 56

[33] See, Somen in the Working World (note 23), p. 16

[34] Conclusions VII, p. 23

[35] Conclusions I, p. 64

[36] Conclusions X-1, p. 116

[37] Conclusions V, p. 95; Conclusions VI, p. 87

equal treatment of illegitimate children.[38]

These examples make clear that the Committee in many respects has developed interpretations of specific Charter provisions trying to detect concrete and enforceable 'rights'; I submit, however, that, considering my reasoning put before you, even more progress could be made. For instance, in many instances the Charter refers to services and activities that have to be made available: wouldn't it be possible to recognise and define an individual right of access to these services?[39] Such an approach has certainly showed its value under article 6 of the Convention, access to court.

It can also be concluded that the Committee is concerned with looking for procedural guarantees, and is trying to define the content of provisions that at first sight seem vague and open for interpretation. Many results have been achieved; in that respect the Committee's approach deserves attention according to which it poses many detailed questions to the Contracting States. Recent examples are to be found in Conclusions XIII-3 with respect to art. 4 (1) (Adequate remuneration) and to art. 12 (3) (Progressive improvement of the social security system). These provisions at first sight contain a relatively open standard, however, the Committee already managed to extract more precise subnorms from these clauses, and it should be considered feasible to go even further in that respect. For instance by making comparative analyses of the various systems in the Contracting States so as to be able to develop 'general accepted standards'. That the Committee has in mind this comparative method in order to be able to concretise and elucidate the Charter's provisions appears from a general observation with respect to art. 4 (1) in Conclusions XIII-3, p. 216: "This information would enable the committee to make, on a consistent and comparable basis, a preliminary assessment of the position in the different states and to refine this at a later stage." This method is "valid for countries with a more or less comparable economic and social structure as is the case within the Council of Europe.." This focus upon individual rights, without neglecting the 'policy' and progressive implementation aspects, will be worthwile and effective.

The present division of tasks between the Committee of Independent Experts and the Government Commitee seems relevant: the Experts are concerned with the legal standards; the Government Committee makes its assessment primarily on the basis of "policy considerations". The Independent Experts adjudicate on national compliance: they rule one transgressions of national discretion whereas the Government Committee can give its opinion or advise about policy aspects.

- <u>The Charter influencing the interpretation of the Convention</u>

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[38] Conclusions XIII-2, pp. 36 and 37: full equality of all children before the law in every respect

[39] See Katarina Tomasevski, Health rights, in: Economic, Social and Cultural Rights (note 1), p. 125-142.

Finally, I wish to draw attention to the scenario in which the Charter and the Conclusions of the Committee of Independent Experts influence the interpretation by the Court of the European Convention. The best example is the decision, referred to *supra*, in the aforementioned case of *Sigurdur A. Sigurjónsson v. Iceland*. In that case the Court accepted under Article 11 of the Convention the notion of the negative freedom of association and the unlawfullness of closed shop practices. In its reasoning the Court advanced as one of the reasons for this expansion of the scope of Article 11 the relevant provision in the European Social Charter and the pertinent Conclusions of the Committee of Independent Experts. The Court argued:

"A growing measure of common ground has emerged in this area also at he international level. (...) Moreover, on 24 September 1991 the Parliamentary Assembly of the Council of Europe unanimously adopted a recommendation, amongst other things, to insert a sentence to this effect into Article 5 of the 1961 European Social Charter (...). Even in the absence of an express provision, the Committee of Independent Experts set up to supervise the implementation of the Charter considers that a negative right is covered by this instrument and it has in several instances disapproved of closed-shop practices found in certain States Parties, including Iceland. With regard to the latter, the committee took account of, *inter alia*, the facts of the present case (...). Following this, the Governmental Committee of the European Social Charter issued a warning to Iceland (...)."

This argument shows the importance of the innovation to issue warnings to States-Parties. It seems likely that the simple fact that a warning had been issued was an important aspect convincing the Court that a European consensus existed in prohibiting closed shop practices.

- <u>EU / EC and the Social Charter</u>

Compared to the (Revised) European Social Charter the Agreement on Social policy is an incomplete and not very substantial document; the comparison as such illustrates the absence of a true EU social Bill of Rights. Accession by the EU/EC to the Social Charter is not very likely, in particular since it would imply an expansian of the Union's powers in the area of social rights. The arguments relied upon by the Court of Justice with regard to accession to the European Convention apply a fortiori to an accession to the Charter. Whatever the legal situation, it is apparent that more has to be expected from the Charter in relationship to national policies and legislation. If the Charter could manage to bring about some advancement in the area of social rights policies by the European Union Member states, this would be a most welcome development. Human rights and democracy form the basis upon which to build a solid and stable 'Europe'; a sound foundation has to include respect for and protection of human rights, freedom rights and social rights. In that respect the European Convention and the (Revised) European Social Charter as well, deserve our special attention and our efforts to have them both fully accepted, incorporated and enforced.

This means that on the national level the Charter's provisions as well as its 'spirit', as established by the Committee of Independent Experts, have to be taken up in national legislation and case-law. It would seem that the same approach applies to the Charter as to the Convention. Good faith compliance does imply that the standards imposed by international treaties have to be guaranteed in the domestic legal order, either directly by making it possible to invoke treaty provisions, or indirectly, by transforming them into nationally recognised legal standards.

4. The Charter and the economy and politics

Supra (paragraph 3) I referred briefly to possible discussions on the role of courts in the area of social development. It is evident that courts, lawyers, supervisory organs etc, should be careful not to tread upon national legislative and budgetary discretion. It goes also without saying that it seems unwise to try to dictate economic and social policies by referring to social rights treaties and other relevant legal documents. Civil and political rights as well as economic, social and cultural rights do not determine economic and social policies, but they do determine the boundaries, the limits of these policies. In that respect there is no significant difference, and no principled argument why social rights should not be justiciable and freedom rights could and should. The Charter does not dictate economic, monetary, or social policies; and if one reads carefully the various provisions in it, it has to be clear that such a dictate cannot be found. At least not more or less than in the Convention and the Strasbourg Court's case law.

Under article 10 of the Convention for instance the Court held, invoking among others, the existence of common ground that no monopoly of public radio and televison existed in European states, that such a monopoly violated the principle of free speech. (*Informationsverein Lentia v. Austria*[40]).

And pertinent to the question of nationalisation policies the Court accepts under article 1 of the First Protocol the expropriation of property, though under the strict obligation to offer appropriate compensation. It also respects national, social policies, aimed at furthering housing conditions and protecting leaseholders as against the owner of their property (*James and others v. the United Kingdom*[41]).

So, also in the context of the Convention the Court generally respects a margin of appreciation; the scope of this margin tends to be wider in those areas concerning specific economic and social policies and national budgets.

A similar reasoning applies in the area of economic, social and cultural rights. Their minimum core,

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[40] ECHR 24 November 1993, Series A, vol. 276.

[41] ECHR 21 February 1986, series A, vol. 98.

their useful effect, has to be guaranteed and should effectively be guaranteed; however, this leaves fully intact national policies aimed at privatisation; careful analysis of the Charter reveals that the Charter does not as such prohibit privatisation policies. Its only goal is to ensure that privatisation cannot be resorted to as an excuse not to live up to the standards laid down in the Charter. But even in that respect, there is no fundamental difference between the Convention and the Charter; also under the Convention it is generally accepted practice that the State can be held responsible for serious infringements committed by private individuals: under the so called positive obligations doctrine the State can be held responsible for failure to offer sufficient protection to the individual.

An example in the Charter of a provision explicitly affording the scope to make the necessary guarantees available among others by a reliance upon the private sector can be found in Article 11, The right to protection of health. This provision stipulates that the Parties undertake to take appropriate measures *either directly or in co-operation with public or private organisations*.

It cannot be denied that the social rights as stipulated in the Charter do envisage a specific context, i.e. they are supposed to be primarily relevant in free democratic societies, operating with a more or less free market economy. The Charter presupposes the freedom of trade unions, of negotiations between employers and workers and the freedom to choose one's work. However, the limits set by these freedoms is, again, nothing new, but they can also be found in or deduced from the Convention.

Undeniably the Charter is an important limit in that it intends to outlaw some policies and that it intends to further some others; it can also be argued that its targets are not always easy to implement. But precisely that ought to be the challenge, instead of the impediment.

The relation between the Charter and democracy is an important one, that cannot be overstated. First of all it is the Charter's aim, and the goal of the social rights in general, to protect economic and social vulnerable minorities. Democracy is more than a rule stating one vote, one value; it also implies that due respect be given to all those living in a democracy; democratic rule means that a free discussion can take place, that those in power can be unseated without bloodshed, that the majority can rule, but also that the majority has to be hindered from infringing upon basic human rights of the minority. And that implies a respect for freedom rights as well as for social rights.

At the same time, the function of social rights is to further debate. Whenever we touch upon the social rights aspect of having to make an effort to improve and to increase the level of social rights protection, the question poses itself of how this can be achieved, and how conflicting interests can and should be resolved. And that requires a balanced democratic decisionmaking process, which can offer a guarantee that the State does not exceed its proper margin of appreciation in balancing conflicting interests. In that respect social rights are indispensable in a true democracy.

5. Conclusion

The above can be summarised in the following points:

1. What seems to be amazing is the fact that the Charter on the one hand contains rights and guarantees that are not unlikely to be found in national legislation; since the justiciability of national social legislation has not been questioned, it is surprising that doubts as to justiciability have been voices regards to the Charter.

2. A precise look at the Charter has shown that its content is in many respects certainly enforceable and concrete and offers many prospects as to a successfull future.

3. The claimed indivisibilty of all human rights exists and has shown many results, in particular in the area of the European Convention, enabling the Court to develop the doctrine of positive obligations.

4. A detailed analysis of the provisions of the Charter leads to a result comparable to the case-law of the Court: many social rights presuppose freedom rights and include many enforceable negative obligations.

5. Social rights can have a great impact by recognising these obligations as well as accepting that other principles and rights can be resorted to in order to give full effect to social rights. In this respect we noted the principle of equality (non-discrimination); the right to privacy; procedural aspects for instance regarding court proceedings.

6. The need to establish as many concrete and individualised rights and obligations; they can be handled by national courts and can better be applied than abstract intentions of making an effort to improve upon specific conditions[42].

7. And even in the context of obligations of effort it is very well possible, in particular for the supervisory organs to exert control: did a state make an effort; did it take steps? Was the general level of protection offered by national legislation improved, or did the state decrease a level of protection previously offered? If so, the burden of proof is upon a national government to clarify:

a. that the minimum level imposed by the Charter has been complied with;

b. that the reduction in the level of protection is in conformity with article G, the restrictions clause, and does not violate other general principles such as the principle of proportionality or of legal certainty/legitimate expectations.

8. These conclusions all presuppose an active legislature being able and willing to take social rights into

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[42] See in that respect also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (note 11).

account and to take them seriously. The Charter therefore has a focus on the legislature and the national Parliaments, as well as on the national courts. Both approaches do not exclude one another but should supplement each other. Social rights are in many respects 'real' rights, even though legislative action is also indispensable.

9. One of the other methods to give more 'bite' to the Charter is to resort to a 'comparative analysis': provisions of the Charter can be concretised by establishing commonly accepted standards in the domestic orders. Such a method of interpretation runs parallel to interpretation techniques employed by the two European Courts.

10. It is important to take note of parallel developments that have been taken place in the case law of the European Court of Human Rights with respect to the European Convention of Human Rights. The European Social Charter could and should profit from these developments. And just as well, it should not be underestimated the role the Charter plays and can play in influencing the Court's case-law in injecting the Convention's rights and freedoms with many social elements taken from and inspired by the Charter.

11. It is in the combination of approaches that the Charter will have to find and prove its strength. Improvement can and should be urged by the supervisory organs and national parliaments; the international supervisory machinery in collaboration with national courts should be considered well equipped to rule on violations, to impose compensation and to enforce conformity with provisions of the Charter.